

KENTUCKY DEPARTMENT OF EDUCATION

STAFF NOTE

Action/Discussion Item:

702 KAR 6:090 Minimum Nutritional Standards for Foods and Beverages available on public school campuses during the school day (Final)

Applicable Statute or Regulation:

KRS 156.035; KRS 156.160; KRS 156.200, KRS 158.XXX

History/Background:

Existing Policy. In 1990, the Kentucky Board of Education (KBE) promulgated an administrative regulation that restricted the time during which schools could conduct sales of food and beverages in competition with the School Breakfast and National School Lunch Programs.

In the 2005 regular session, the Kentucky General Assembly passed SB 172, creating new sections of KRS 158. The bill was signed by the Governor and took effect on June 20, 2005. Among other things, the bill requires that the KBE promulgate an administrative regulation specifying “the minimum nutritional standards for all foods and beverages that are sold outside the National School Breakfast and National School Lunch programs, whether in vending machines, school stores, canteens, or a la carte cafeteria sales.” The language goes on to specify that the “administrative regulation shall address serving size, sugar, and fat content of the foods and beverages.”

Staff is recommending that KBE use the current 702 KAR 6:090 as a vehicle it to meet the mandate in SB 172 through its amendment.

Policy Issue(s):

The proposed amendments to 702 KAR 6:090 will bring the regulation in conformance with the mandate in SB 172. The changes include:

Page 1, lines 5-21 and Page 2, lines 1-7 – changes the regulation title, “Relates to” clause, “Statutory Authority” clause, “Necessity, Function and Conformity” clause

Page 2, lines 8-20 – stipulates the minimum nutritional standards for beverages that may be made available through vending machines, school stores, canteens, etc., in all schools during the period of time between thirty (30) minutes after lunch until the end of the last instructional period. Those beverages include:

- a. Fluid unflavored or flavored milk that is no more than 1% milk fat;
- b. Plain or flavored water that is non-carbonated and non-caloric;
- c. 100% fruit or vegetable juice or any combination of both totaling 100%;
- d. Any other beverage that contains no more than ten (10) grams of sugar per serving, except for 100% fruit or vegetable juice or any combination of both equaling 100%;
- e. Caffeine –free, except for low-fat milk; and
- f. The volume size of the beverages listed in this section shall not exceed seventeen (17) ounces, except for the water.

Rationale:

- a. The standard regarding milk has been changed to stipulate 1% milk fat. The statute says “low-fat milk” and staff is recommending that Kentucky use the federal labeling definitions that stipulate “low-fat” is 1% or less milk fat.
- b. The standard regarding water has been changed to allow flavored, non-carbonated waters as long as those have no calories. This change is recommended by staff and supported by the nutrition community and local food service directors. The change will provide additional choices and flexibility regarding beverage offerings.
- c. The 100% fruit juice standard is in the statute. At the request of the nutrition community we have added 100% vegetable juice.
- d. The “any other beverage containing less than 10 grams of sugar per serving” language is in the statute with regard to elementary schools. Staff recommends the language should be consistent at the middle and high schools.
- e. The standard regarding caffeine has been the subject of some debate. Caffeine is a mood altering diuretic. Symptoms of caffeine “withdrawal” are real and include headaches, nausea, irritability, anxiousness, etc. It causes increased urination that leads to fluid loss. The issue is not the effects of caffeine – those are too well documented to beg discussion – but whether access to it in beverages should be limited and to what extent. Staff recommends that access should be limited at all grade levels.
- f. The standard regarding volume has been increased by one ounce to account for current bottling practices, and the change is supported by staff and the Heart Association, The Action for Healthy Kids Task Force, the Kentucky School Boards Association (KSBA)*, Kentucky Association of School Administrators (KASA)* and the beverage industry* (*with regard to elementary schools only). We see a need to specify portion size for several reasons. First, the statute requires that the administrative regulation address portion size; second, we need to begin to educate students regarding appropriate portion size, including beverages; and third, we need to avoid teaching children that it is enough to “drink” a meal. The Tennessee State Board of Education has recommended an 8-ounce portion limit (excepting water) and the Arkansas Department of Education has recommended a 12-ounce limit (excepting water). Staff is comfortable recommending the 17-ounce limit, again excepting water.

The Kentucky Beverage Association, KSBA, KASA and the Local Superintendents Advisory Council (LSAC) continue to strenuously oppose applying the same beverage standards to elementary, middle and high schools. The arguments in favor of their opposition range from

legislative intent (as explained at the June KBE meeting), to allowing more choices for older students, to infrastructure problems for bottlers. Sponsors of SB 172 have been clear that they support applying the proposed beverage standards to all schools and the proposed standards do allow for a number of choices to still be available to students in portion sizes that bottlers currently produce. The proposed standards would allow for a number of flavored, no-calorie water products currently on the market (Dasani Lemon and Raspberry, AquaCal, Fruit 2O, for example) in the 16.9 ounce bottle as well as all of the caffeine-free diet soft drinks, such as Diet Sprite, Diet 7Up, caffeine-free diet Coke and Pepsi and Diet Rite Cola in the 12-ounce can. Finally, these restrictions apply to vending sales only for a period of time during the school day. Once the last instructional period ends, schools can vend whatever they choose.

KSBA, KASA, LSAC and the beverage industry prefer a tiered approach from elementary to middle to high school that would allow for more expansive standards in terms of sugar content and portion size resulting in increased numbers of choices available to students. Of particular concern are sports drinks, generally containing 15 grams of sugar per serving, and 20-ounce containers, typically containing 2.5 servings. The student consumes 45 grams of sugar in a 20-ounce sports beverage, or 180 calories, all from sugar. There are two resulting problems: it contributes to increased incidence of dental caries and it displaces room for more nutrient-dense calories. Staff believes these proposed standards are in the best interest of all children and put the schools in the position of modeling what they are teaching.

Page 2, lines 21-22; page 3, lines 1-23; and page 4, lines 1-6 – contains new language setting minimum nutritional standards for food items that may be made available in elementary, middle and high schools from vending machines, school stores, canteens, and fund raisers, during the period of time beginning thirty (30) minutes after the last lunch period until the close of the school day (as previously defined). Those food items must meet the following standards:

- a. Calories from fat and saturated fat shall not exceed thirty (30%) and ten (10%) percent, respectively, except for nuts, seeds and nut butters;
- b. Calories from sugar, naturally occurring and added, shall be limited to no more than thirty-two (32%) percent by weight and, in no case, shall the gram weight per serving of sugar exceed fourteen (14) grams. This limit does not apply to fresh, frozen, canned or dried fruits or vegetables found in the Food Buying Guide for Child Nutrition Programs;
- c. Chips, cereals, crackers, baked goods and other such snack items shall be limited to no more than 300 mg of sodium per serving; pastas, meats and soups shall be limited to no more than 450 mg of sodium per serving; while pizzas, sandwiches and entrée-type dishes shall be limited to no more than 600 mg of sodium per serving;
- d. Portion/pack/serving size or chips, crackers, popcorn, cereal, trail mix, nuts, seeds or jerky shall be limited to no more than two (2) ounces;
- e. Portion/pack/serving size for cookies shall be limited to no more than one (1) ounce;

- f. Portion/pack/serving size for cereal bars, granola bars, pastries, muffins, doughnuts, bagels, and other bakery-type items shall be limited to no more than two (2) ounces;
- g. Portion/pack/serving size for non-frozen yogurt shall be limited to no more than eight (8) ounces; and
- h. Portion/pack/serving size of frozen dessert items including but not limited to low fat or fat free ice cream, frozen juice bars; and frozen fruit items, shall be limited to no more than four (4) ounces.

Rationale: Reactions to these standards have been mostly positive. However, reactions differ to some portion sizes, although those differences are very minor. For example, some prefer .75 ounces on chips and crackers and .25 ounces on trail mix, nuts and seeds. Staff feels that the portion sizes proposed are very reasonable and should be adopted as written. There is agreement with regard to sodium restrictions, calories from fat and saturated fat, and sugar.

The language restricting use of some food items as rewards for classroom behavior (part of the draft presented at the June meeting) has been removed. Staff will encourage districts and schools to stop this practice and substitute other items in cases where achievement or behavior is deemed insufficient as its own reward, and we hope that the various colleges of education will stop recommending this to teachers in training.

Page 4, lines 7-15 – contains new language setting minimum nutritional standards for food and beverage items offered for sale as on an a la carte basis on the cafeteria line during the serving of breakfast or lunch. Those items must meet the following standards:

- a. Beverages shall meet the standards in Section 1 of the proposed amendment, meaning that a la carte beverages in all schools shall be limited to fluid low-fat milk; 100% fruit and/or vegetable juices; plain or flavored, non-caloric, non-carbonated water; and any other beverage that contains no more than ten (10) grams of sugar per serving. The final stipulation is that container volumes not exceed seventeen (17) ounces.
- b. Food items shall meet the standards in Section 2 of the proposed amendment with the exception that schools may offer for a la carte sale any item that is creditable under the School Breakfast Program and National School Lunch Program meal pattern as set forth in 7 CFR 220.8 and 7 CFR 210.10, respectively.

Rationale: Staff has given considerable thought to this language. Some constituencies propose limiting the a la carte serving and/or the portion size of some otherwise creditable items. Menu planning is at the heart of the operation of the breakfast and lunch programs, and the meal pattern is the starting point for menu planning. Those items have been and remain the subject of considerable scrutiny on the part of the United States Department of Agriculture (USDA). The virtues of using the meal pattern are several: (1) It provides items that have been the object of scrutiny by the United States Congress and the federal agency responsible for these programs and the funding of them; (2) Referencing the meal pattern prevents one from having to amend this proposed regulation when changes to the meal pattern occur; (3) Referencing the meal pattern will prevent confusion for menu planners; (4)

Referencing the meal pattern will avoid the impossible compliance situation where there are not enough staff across related state agencies, and in the local health departments to monitor how much of which items schools are offering on the a la carte lines; and (5) Referencing the meal pattern will allow maximum use of donated commodities, some of which do not meet the “standards” of some constituent groups.

Since virtually all of the district food service programs are self-supporting (with about half of them assisting the General Fund by the payment of indirect costs), we consider the use of the meal pattern here to be significant for the long-term health of the programs. Although not in the proposed amendment, one avenue of compromise might be to allow the a la carte sale of any creditable item but limit the portion size to the age and grade range specified in the meal pattern regulations. Staff offers this for consideration.

Page 4, lines 16-23 and page 5, lines 1-5 – contains new language dealing with the required annual assessments and reporting of the status of school nutrition in the districts. The language sets timelines for the first annual reports (due to the local board on or before the end of November 2005) and the first annual plans for improvement (to be done by local boards on or before January 31, 2006), and summaries due to the KBE on or before March 1, 2006. The legislative language requires that the report include specific items and be made in writing to parents, the local school board and school-based decision making councils, but does not include direction as to the timing or the format of the assessments or the reports.

Rationale: Although the legislative language does not include direction as to the timing of the assessment and the report, we have set what we believe to be reasonable timelines for those items. Staff has also developed an assessment tool, “The Standards and Indicators for School Nutrition Programs” (attached, but not incorporated by reference). This instrument is formatted very similarly to the more familiar SISI document used for school improvement purposes. We hope districts will use the instrument to conduct the required assessment and will strongly encourage it. Staff has also developed a reporting instrument, “The Nutrition and Physical Activity Report Card,” and will encourage districts to use it as well. Staff strongly believes that consistency in assessment and reporting instruments and formats will make the reports much more meaningful to the various audiences receiving the reports.

The legislative language requires that the reports include a "list of foods and beverages that are available to students, including the nutritional value of those foods and beverages." This represents a particularly burdensome requirement, especially in view of the fact that a medium-size district may have as many as 200-300 items on the food service program bid, not to mention the items that are available from other sources such as vending machines and school stores. If one adds the requirement for the nutritional value of each of those items, that reporting requirement becomes onerous in terms of both printing and postage costs. This concern was presented to the primary sponsor of the bill, but no alternative was offered.

Staff proposes to allow districts to make that list available on the district web site while informing the required audiences of the availability of the list through an announcement in the “Report Card.” The other required elements of the report are included in the “Report

Card.” Staff believes the advocacy community, based on communication from the Heart Association, will favorably receive this approach.

Not so well-regarded is our suggestion that the every five-year review required by federal regulations and conducted by our staff substitute for the school nutrition assessment and that the recommendations from that report form the basis for the SB 172 report and required improvement plan. Currently, our review covers many of the same areas and more, and if necessary, our assessment instrument can be augmented. We hope the KBE will look favorably on the language as presented.

Page 5, lines 6-13 – contains new language dealing with the required annual assessments and reporting of the “physical activity environment” in the districts. The language sets timelines for the annual reports .

Rationale: In the absence of legislative guidance, we have set what we believe are reasonable timelines for the annual assessments and reporting. In lieu of re-inventing the wheel, staff is recommending that districts use the Physical Education and Physical Activity module of the School Health Index from the Centers for Disease Control and Prevention (CDC) as the instrument to assess the physical activity environment and the previously mentioned “Nutrition and Physical Activity Report Card” to report the same. Staff believes that consistency in the use of instruments and reporting formats will facilitate communication with the various audiences.

Staff believes that the language in Sections 4 and 5 of the proposed amendment will be helpful to districts, but awaits the KBE’s guidance.

Page 5, lines 14-21 – deletes current regulatory language.

At the June meeting, the initial staff note touched on the issue of pizza as a “retail, fast food”. Staff takes the position that pizza does fit in that category. Some KBE members expressed that local districts should deal with that issue. Any additional guidance on this issue that KBE desires to give staff and the districts would be appreciated.

Staff has again been asked to deal with one final issue in the proposed amendment - that of eliminating the use of deep-frying as a food preparation method. As you can see from the language before you, we have declined that request. Increasingly, we have seen elementary schools removing or at least ceasing use of deep fryers. Staff that review kitchen construction/renovation plans recommend against purchase/installation of deep fryers. The federal requirements of no more than 30% of calories from fat/10% from saturated fat mitigate against deep frying. Eliminating a food preparation method will do nothing to further the goal of educating children with regard to variety and balance in the diet accompanied by physical activity. Staff again recommends that the KBE decline any request to include this issue.

Staff Recommendation(s) and Rationale(s):

Staff recommends final approval of 702 KAR 6:090. See the rationale listed below the specific changes above.

Impact on Getting to Proficiency:

Healthier children learn at higher levels.

Groups Consulted and Brief Summary of Responses:

Kentucky Association of School Administrators
Kentucky School Boards Association
Kentucky Beverage Association
American Heart Association
Kentucky Action for Healthy Kids Task Force
Foundation for a Healthy Kentucky
Kentucky School Nutrition Association (formerly the Kentucky School Food Service Association)
Local Superintendents Advisory Council (LSAC)

Responses from the various groups have been included in the discussion of staff recommendations and rationales. LSAC will forward its input to the Board via a letter from that body.

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Date:

August 2005